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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARCO ABUNDIZ,

Petitioner,

v.

THE SUPERIOR COURT OF
SANTA CLARA COUNTY,

Respondent,

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Real Party in Interest.

H034906

(Santa Clara County
Super. Ct. No. 211361)

Petitioner Marco Abundiz requests the issuance of a writ of mandate and/or prohibition directing the trial court to “dismiss Mr. Abundiz from Santa Clara County Court Case No. 211361 and grant Mr. Abundiz such other relief as it deems appropriate.” The question presented is whether *Kellett v. Superior Court* (1966) 63 Cal.2d 822 bars the People from prosecuting defendant on charges that he actively participated in a criminal street gang (Pen. Code, § 186.22, subd. (a)) and conspired to sell methamphetamine to benefit a street gang (Pen. Code, §§ 182, 186.22, subd. (b)(1))

between January 1, 2002, and December 4, 2008, when he was previously convicted of selling methamphetamine for the benefit of a street gang (Health & Saf. Code, § 11379; Pen. Code, § 186.22, subd. (b)(A)) on December 12, 2006, and possessing methamphetamine for sale for the benefit of a street gang (Health & Saf. Code, § 11378; Pen. Code, § 186.22, subd. (b)(A)) on February 22, 2007. We hold that *Kellett* and its progeny bar defendant's prosecution for active participation in a street gang, but do not bar his prosecution for conspiracy. Accordingly, we will issue a writ of mandate and direct the trial court to dismiss defendant from count 1 of the indictment in case number 211361, alleging active participation in a criminal street gang.

FACTUAL AND PROCEDURAL BACKGROUND

Santa Clara County Case 211137

In 2007, the Santa Clara County District Attorney (DA) indicted defendant Marco A. Abundiz on two counts in Santa Clara County Case No. 211137 as a result of an investigation by the San Jose Police Department with assistance from the FBI, DEA, and the ATF. In the first count, the DA alleged that on or about December 12, 2006, Abundiz sold methamphetamine, a controlled substance. (Health & Saf. Code, § 11379.) It further alleged that Abundiz sold 57 grams or more of a substance containing methamphetamine. (Pen. Code, § 1203.073, subd. (b)(2).) In the second count, the DA alleged that on February 22, 2007, Abundiz possessed methamphetamine for sale. (Health & Saf. Code, § 11378.) Both counts included a gang enhancement, alleging that the offense charged was perpetrated “for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members.” (Pen. Code, § 186.22, subd. (b)(1)(A).)

On October 1, 2007, Abundiz pleaded no contest to both counts, including the gang enhancements, in exchange for a reduced prison sentence of 12 years four months. The plea was based on the factual basis established by the Grand Jury transcripts and

police reports.

The police reports, filed by Officer Tom Tiphayachan, outlined information garnered through the use of informant William Vick. According to the police report, on December 12, 2006, Abundiz sold Vick 3.5 ounces of crystal methamphetamine in exchange for payment at a later date. Vick testified to a second discrete event, on February 22, 2007, in which he turned over to law enforcement a safe containing drugs belonging to Abundiz that was kept in a “safe house” used by Abundiz. Furthermore, Vick reported to law enforcement that Abundiz was considered a Category I “C” and Regiment Security within the Nuestra Familia (NF) gang who collected monthly dues of \$150 from Vick and reported “to a higher chain of command.”

According to Vick, Abundiz had been increasing Vick’s responsibilities to prepare him to take over Abundiz’s position when Abundiz moved to Texas to start a new NF gang regiment. Vick’s new responsibilities included previewing or “filtering” messages contained in “kites”¹ from Soledad State prison. Vick would show these kites to Officer Tiphayachan before showing them to Abundiz for eventual forwarding to Pelican Bay State Prison. Vick was also responsible for meeting newly released NF associates and finding them places within existing NF regiments.

Additionally, Officer Tiphayachan explained the place NF members have in the hierarchy of Norteño factions. They rank above Nuestra Raza (NR) and Norteño street gangs. Tiphayachan explained that there were three categories of NF members, with Category 1 being the lowest and Category 3 being the highest ranking. Tiphayachan explained that the NF is a gang based out of prison which supports itself primarily through “profitable criminal endeavor[s]” such as the sale of narcotics, although other primary activities included murder, murder for hire, assault, identity theft and illegal firearm sales/trafficking. The proceeds from these activities are deposited in an “NF

¹ A kite is a letter written in tiny writing.

Bank” and are sent to incarcerated NF members to purchase items in prison such as books and food. The proceeds are also used to pay for members’ houses, cars, legal fees and their children’s college funds. Money that is not placed in the NF Bank can be used by NF members for their own profit and benefit. Sales of narcotics are made by functioning street regiments. Street regiments generally have one NF member, often a Regiment Commander, who reports to the gang’s “General of the Streets.” Tiphayachan concluded, on the basis of evidence provided by Vick, photos containing Abundiz and other NF members, and tattoos, that Abundiz, Lorenzo Guzman, and Frank Ruiz were either “members or associates” of NF and that the charged crimes were done in association with, for the benefit of, or at the direction of, NF members.

Two charges were alleged in an amended indictment. Both involved informant William Vick. After being arrested on weapon and drug charges, Vick approached law enforcement about informing on the NF gang. Vick met Abundiz at his home on December 12, 2006, to purchase crystal methamphetamine from him at the behest of law enforcement. Abundiz gave Vick one ounce of “clean” methamphetamine, and one and one-quarter ounces of “dirty” methamphetamine on credit. Vick was to pay Abundiz \$1,900 for it later, after selling it on the street. Vick then drove to a spot where he met with members of “the DEA . . . San Jose narcotics, San Jose gang unit, [and] FBI” and dropped off the drugs.² Approximately one week later, Abundiz called Vick about the money and, at Abundiz’s direction, Vick delivered it to Abundiz’s mother-in-law.

On February 22, 2007, Vick was supposed to go with Abundiz to meet someone and drop off a pound of marijuana at a “safe house” where Abundiz stored his drugs. However, the person with whom they were to meet called Abundiz to warn him that a

² One envelope contained 34.1 grams of methamphetamine that were 98 percent pure. The other contained 55.5 grams of methamphetamine that were 38 percent pure; the remaining product was dimethyl sulfone.

suspected undercover “narc” was parked in front of the safe house. Abundiz instructed Vick to have his girlfriend come over to the house and get the safe out of the house “right now.” She did, and gave it to Vick. Vick had the key to the house and the safe. He turned the safe over to law enforcement. He thought there was a pound and a half of crystal methamphetamine in the safe.³ Later, Abundiz wanted the safe back, and Vick had to stall him with the story that it was secure at his brother’s house.

Before the grand jury, the prosecutor sought to impress upon the jury the broad reach of the NF in “every single neighborhood in northern California” under command from its leaders in Pelican Bay. To that end, Sergeant Larry Day and Vick provided testimony regarding the structure of the NF.

Sergeant Day explained the hierarchy of the Norteño NF gang. At the top of the hierarchy are three generals housed in Pelican Bay. These are (1) the Street Regiment General, who controls gang members on the street and receives the funds and information generated on the street; (2) the General Advocate Office, who metes out discipline to wayward members; and (3) the General of Prisons, the overall leader of the organization. Sergeant Day stated that these three members were part of a five to 10 member Mesa or “board of directors” but did not explain how the Mesa operates, except that each member had a “vote” on actions taken by the NF, although the three generals made the ultimate decision. Below the Generals in Pelican Bay are the NF members. There are roughly 80 NF members, known as “Colonels” or “C’s”. Sergeant Day outlined the NF ranking system as dividing its membership, from highest rank down, into three Generals, probably five to eight Captains, 20 Category 3 members, 20 Category 2 members, and 30 Category 1 members. Beneath the Colonels are the NR, who Sergeant Day identified as a subordinate offshoot of NF composed of “street gang members who grew up and became hard-core criminals,” eventually numbering about 2,000. That group was created when

³ Apparently, a search of the safe house on February 22, 2007, yielded two containers containing 230 and 448 grams of methamphetamine respectively.

all of the NR members were locked up in solitary confinement in very high-security prisons. However, over time, the NR became so big and unwieldy that the NF had difficulty controlling it, until NF members began paroling out of prison and took over calling the shots on the street. The NR members have no rank within the NF, but do hold sway over younger Norteño street gang members who aspire to climb into the ranks of the NR by being the best Norteño criminals around.

Finally, Sergeant Day explained that the lower rank of NF consists of the “regiments out in the neighborhoods.” He opined that their primary activity is narcotics trafficking, from which the NF derives its biggest profits. After discussing murder cases involving various NF members, Day mentioned one case involving an NF street regiment. A leader, or regiment commander, was in charge. Art Hernandez was believed to be the regiment security, and below him were squad leaders. Together, they functioned as “part of a large-scale drug dealing operation involving crystal methamphetamine in the City of San Jose and Santa Clara County.” Abundiz was not mentioned as one of these individuals.

Vick, a former NR member, provided an insider’s perspective on the NF. Vick explained the prison-based education of new NR members, which he distinguished from higher ranking NF members. Vick testified that members of the NF organization are required, upon release, to make money for the organization through illicit enterprises, “whether it be drug dealing, contract hits for people, prostitution, extortion, whatever it may be.” They do this by joining an NF street regiment, which can cover a large area. For example, the San Jose regiment extends from Gilroy to Milpitas. Regiment Commanders set monetary contribution levels for each member of the regiment, and those dues are collected by the Regiment Security. That money goes into the NF’s bank. The NF then “invest[s] it into legitimate businesses to take care of members behind the wall.”

Vick and Sergeant Day both testified about Abundiz’s status in the NF

organization. Vick testified that Abundiz was a Category 1 NF member holding a Regiment Security position under Charlie Campa, the Regiment Commander from Hollister. Cat 1 is “the lowest category of rank.” Both men joined the NF in 2005, but Abundiz’s membership was approved “by the Mesa, up in the Bay” earlier than Vick’s was, because Vick was “locked up.” As a result, Abundiz was Vick’s “reporting channel,” and he paid his monthly dues to Abundiz when got out.

Sergeant Day, on the other hand, testified that he believed Abundiz was a high-ranking member in charge of directing and supervising other gang members. He based this opinion on information obtained from informants, investigators, and “other evidence.” He also based it on the fact that the jail housed Abundiz in one of the four or five cells reserved for high-ranking NF members “that are kept separate from the rest of the population.” In addition, Sergeant Day testified that the contents of Abundiz’s telephone conversations with Vick on December 12 led him to believe that Abundiz was an NF member. Abundiz knew that Sammy Ramirez, a known NF member, had been ordered by the leadership at Pelican Bay to deliver 32 kites to the San Jose leadership, but the kites, which he had secreted in his rectum, had been discovered and seized at Salinas Valley State Prison. Abundiz also asked Vick if he had been “kicking it with L,” which Day believed meant hanging out with Lorenzo Guzman, another known NF member. Abundiz and Vick also talked about a portion of the money earned from the sales of narcotics going “back to the organization.” In addition, Sergeant Day stated that Abundiz’s December 12, 2006 sale of methamphetamine to Vick and his February 22, 2007 possession of methamphetamine for sale were for the benefit, and at the direction, of the NF because the profits from street level drug sales go back to the organization.

Santa Clara County Case 211361

In 2008, the Santa Clara County District Attorney filed the present action including Abundiz as one of 20 charged defendants in Santa Clara County Case No.

211361 as a result of an investigation by the Campbell Police Department. The indictment includes two counts. In the first count, the indictment alleges that Abundiz and his co-defendants participated in a criminal street gang between January 1, 2002, and December 4, 2008. (Pen. Code, § 186.22, subd. (a).) In the second count, the indictment alleges that Abundiz and his co-defendants conspired to sell methamphetamine between January 1, 2002, and December 4, 2008. (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379, subd. (a).) The indictment alleges Abundiz engaged in three overt acts between January 1, 2002, and December 4, 2008: (1) he was a member of Charlie Campa's NF street regiment; (2) he was involved in selling methamphetamine on behalf of the NF organization that was provided by Charlie Campa and Sammy Ramirez, personally or through their subordinates; and (3) he committed the offenses charged for the benefit of a criminal street gang.

The grand jury proceedings in the present case featured a fresh set of witnesses to explain the NF organization.

Sergeant Dan Livingston provided a more detailed history and analysis of the NF than that seen in Abundiz's previous case. Sergeant Livingston dissected the NF hierarchy, including the three categories of membership. He added that a member needed at least 10 years of service and a three-quarters vote to achieve Category 3 status. Further, Sergeant Livingston explained that Category 1 members, although probationary members of the NF, commanded respect from other street gangsters and had authority over NR members, street gang members, and associates with the gang. With regard to street regiments, he described the Regiment Security as a second in command to the Regiment Commander, ready to "step up as the head" if anything should happen to the commander. He detailed the Regiment Security's duties as keeping track of weapons stockpiles and doing most of the visible work for the Regiment Commander so that the commander is not easily identified.

Sergeant Livingston identified Abundiz's role in the system as Regiment Security

or second in command for San Jose with several co-defendants and others as subordinates. These subordinates included Vick, Mike Chandler, Sonny Lujan, and Carlos Ramirez. Sergeant Livingston identified Abundiz as an NF member on the basis of his tattoos, statements from Chris Klipp, Patrick Martinez, John Mendoza, and William Vick, and a photo of Abundiz “associated with Charlie Campa.”

Several new informants provided a more detailed look at NF activities and Abundiz’s role in those activities. In particular, Debbie Guzman, the wife of NF member and co-defendant Lorenzo Guzman, witnessed a meeting between Abundiz and her husband shortly before her marriage to Lorenzo, and Abundiz’s marriage to his wife at the same time, on October 7, 2005. She also witnessed many meetings between her husband, Abundiz, Charlie Campa, and Sammy Ramirez starting shortly before her marriage in October 2005 until her husband’s arrest in March 2007. Before her marriage, she did not sit in on the meetings, but after her marriage, Lorenzo conducted all of his NF business openly in front of her. He explained more about how the NF was organized to her. She sat in on the meetings; they were often held at Abundiz’s residence. She identified the four attendees of those meetings, including Abundiz, as the four NF members “running the bay area.” However, she made it clear that Abundiz and Sammy were lower in rank than Campa and her husband. In the meetings, the foursome discussed directives from gang leadership in Pelican Bay, drugs, and discipline for lower ranking members. They communicated with each other by walkie-talkie and referred to each other by code names that reflected the colors of their complexions.

Guzman also provided insight into Abundiz’s specific actions. The first time she met Abundiz, in September or October 2005, she went with Lorenzo Guzman to Abundiz’s house. Lorenzo emerged from a five-minute meeting with Abundiz with a wad of cash – \$12,000. Abundiz and Lorenzo had a “pretty thick” bag with them. She didn’t know it contained drugs at the time, but she figured it out afterwards. She heard Abundiz complain that he had twice sent money and letters to incarcerated leaders at

Pelican Bay and in federal prison in Colorado to cover for her husband, whose job that was supposed to be. She also saw between 10 and 20 drug transactions take place between the four men. She saw them actually conduct drug transactions involving PCP and crystal methamphetamine during the meetings between the four of them. She identified her husband as the supplier of PCP to the other three, and Charlie Campa as Abundiz's methamphetamine supplier.

Her testimony on this latter point is supported by that of former NR member Chris Klipp. Klipp testified that he personally saw Campa front Abundiz methamphetamine in quantities between two and four pounds, and that this happened on approximately 20 occasions. According to Klipp, Abundiz started out as an NR member but was promoted to NF membership and functioned as the second in command within Charlie Campa's regiment from 2003 until his arrest in 2007 in case number 211137. Klipp further testified that he had personally given Abundiz methamphetamine during the time Abundiz functioned with the regiment, from 2003 until his arrest.

Guzman's and Klipp's testimony is also supported by that of Patrick Martinez, who stated that Abundiz was "bumped up" from NR to NF, and functioned as Charlie Campa's second in command. Martinez bought a couple of ounces of methamphetamine from Abundiz in 2005 and split a half pound of methamphetamine with Abundiz in 2006.

Finally, Guzman explained how the chain of command in drug sales worked in her husband's regiment. Her husband collected dues from people to whom he fronted drugs and they sold drugs for him. He also collected dues from people to whom he sold, rather than fronted, drugs through Shorty, who was beneath him in the hierarchy. Shorty, in turn, sold the drugs to several others lower in the chain, or fronted drugs to people in his own crew. Other people who bought from Shorty had their own crews as well. She did not say how this arrangement compared to other street regiments.

In addition to Guzman and Sergeant Livingston, the prosecution had three witnesses testify that Abundiz was a NF member functioning as Campa's second in

command. These witnesses were Martinez, Klipp and John Mendoza (who had been a high ranking NF member). A final witness, Enrique Hernandez Rodriguez, testified that Abundiz was a NF member and that Frank Ruiz, Rodriguez's contact upon parole, was functioning under Abundiz. After Abundiz and Ruiz were arrested, Rodriguez was forced to use another contact when he paroled in April 2007. Each of the witnesses also provided insight into gang operations that were not directly related to Abundiz.

DISCUSSION

Introduction

In the trial court, defendant Abundiz challenged the indictment in case number 211361 on the grounds that at the time he was prosecuted under case number 211137, "there was evidence sufficient to bring the charges that are so-called new," and therefore, under *Kellett*, the charges alleged in case number 211361 must be dismissed. In this court, defendant renews that argument by way of writ, contending that he cannot be charged with active participation in a gang (Pen. Code, § 186.22, subd. (a)) or conspiracy to sell methamphetamine (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379, subd. (a)), because the facts underlying these charges were known to the prosecution at the time he was charged with, and pleaded no contest to, the 2006 and 2007 offenses alleged in the first indictment, and the new conspiracy and active participation charges arise from the same course of conduct as the possession and possession for sale charges to which he has already pleaded no contest. We conclude that the *Kellett* motion was properly denied as to the new charge of conspiracy, but that the prosecution for active gang participation is barred by *Kellett*.

General Principles

Penal Code section 654 provides in relevant part: "An acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission

under any other.” (Pen. Code 654, subd. (a).) In *Kellett*, the seminal case interpreting section 654’s bar against multiple prosecutions, our Supreme Court held that when “the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance is permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.” (*Kellett v. Superior Court, supra*, 63 Cal.2d at p. 827.) The purpose of the *Kellett* rule is to prevent needless harassment and the waste of public funds through multiple trials based on the same underlying facts. (*Ibid.*)

An exception to the *Kellett* rule is recognized “where the prosecutor ‘ “ ‘is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.’ ” ’ ” (*People v. Davis* (2005) 36 Cal.4th 510, 558, quoting from *People v. Scott* (1997) 15 Cal.4th 1188, 1202.) For this exception to apply, the prosecution must have exercised due diligence in searching for additional evidence. (*Davis*, at p. 558.) Where a defendant enters a plea to an iceberg-type offense, the prosecution can bring charges for the more serious offense at a later date. (*In re Hayes* (1969) 70 Cal.2d 604, 610, fn. 11.)

Moreover, “*Kellett* does not require, nor do the cases construing it, that offenses committed *at different times and at different places* must be prosecuted in a single proceeding,” and a defendant may be prosecuted for conduct that occurred prior to the conduct for which he has already suffered a conviction. (*People v. Cuevas* (1996) 51 Cal.App.4th 620, 624.) Finally, the *Kellett* rule is limited to cases where the prosecutor has or can reasonably obtain sufficient evidence to sustain a conviction. (*People v. Davis, supra*, 36 Cal.4th at p. 558.) To “give practical meaning to the interpretation” of section Penal Code section 654 by *Kellett*, courts have developed and applied “an

‘evidentiary’ test as a guide to determining if the *Kellett* criterion (whether the same act or course of conduct plays ‘a significant part’ with respect to each crime) is met. . . . ‘[W]hat matters, [rather than abstract definitions of the elements of the respective crimes or the precise moment when one crime was completed] is the totality of the facts, examined in light of the legislative goals of [Penal Code] sections 654 and 954, as explained in *Kellett*.’ More specifically, if the evidence needed to prove one offense necessarily supplies proof of the other . . . the two offenses must be prosecuted together, in the interests of preventing needless harassment and waste of public funds.” (*People v. Hurtado* (1977) 67 Cal.App.3d 633, 636, quoting from *People v. Flint* (1975) 51 Cal.App.3d 333, 338.)

Analysis

With respect to count 1, active participation in a criminal street gang, Abundiz contends that the prosecutor “had all the evidence she needed to charge [defendant] with actively participating in [NF].” We agree.

In order to prove the sentence enhancement alleged under Penal Code section 186.22, subdivision (b)(1), the prosecution is required to show that (1) the defendant committed a felony for the benefit of, at the direction of, or in association with, a criminal gang; and (2) the defendant intended to assist, further or promote criminal conduct by gang members. (CALCRIM 1401.) In order to prove the substantive crime of active participation in a criminal street gang, alleged under Penal Code section 186.22, subdivision (a), the prosecution must show that (1) the defendant actively participated in a criminal street gang; (2) when he participated in the gang, he or she knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; and (3) the defendant willfully assisted, furthered or promoted felonious criminal conduct by gang members either by (a) directly and actively committing a felony offense or (b) aiding and abetting a felony offense. (CALCRIM 1400.) As this court observed in *In re Jose P.*

(2003) 106 Cal.App.4th 458, “A person need not be a gang member to be guilty of violating section 186.22(a). [Citation.] But he or she must have had more than a nominal or passive involvement with the gang, knowing of the gang’s pattern of criminal activity, and must have aided and abetted a separate felony committed by gang members.” (*Id.* at p. 466.) Furthermore, “[t]he existence of a criminal street gang is unquestionably an element of both the enhancement and the substantive offense.” (*Ibid.*) Under either statute, “[t]o prove the existence of a criminal street gang, ‘the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a “pattern of criminal gang activity” by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called “predicate offenses”) during the statutorily defined period.’ ” (*Id.* at pp. 466-467, quoting from *People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

Abundiz relies on testimony presented to the grand jury in his prior case to demonstrate that the prosecution was aware of his gang participation. On the active participation charge, Abundiz argues that the testimony of Sergeant Day and police informant William Vick established Abundiz’s involvement in the NF gang and in a conspiracy with other ranking gang members to sell methamphetamine. On the conspiracy count, Abundiz argues that Vick’s testimony to his status as a drug dealer operating as Charlie Campa’s second in command, with profits going to Guzman, established a conspiracy to sell methamphetamine. Only Abundiz’s first argument has merit.

In the prior case, Officer Tiphayachan’s investigation, and Vick’s and Sergeant Day’s testimony, established Abundiz’s membership in the NF gang, his rank within the NF gang structure, and the duration of his tenure with the gang. Officer Tiphayachan’s

police report and Sergeant Day's testimony established the reach and ranking system of the NF prison gang. From this evidence, it was clear at the time of the first grand jury hearing that Abundiz had possessed and sold drugs for the benefit of the NF gang, and that he had some clout within the gang. Therefore, there was sufficient evidence to satisfy not only the gang enhancement statute, but also the substantive offense statute, because evidence demonstrated (1) that Abundiz actively participated in NF, (2) that Abundiz knew the gang engaged in a pattern of criminal activity, and (3) that Abundiz directly and actively committed a felony offense. (See CALCRIM No. 1400.)

Moreover, the prosecution did not produce any new evidence that Abundiz continued his participation in NF after his arrest in 2007. The new evidence presented at the second grand jury proceedings provided more detail about his participation in NF prior to and contemporaneously with the time period during which Abundiz committed the offenses which were the subject of the first grand jury proceeding. It is true that at the second grand jury proceeding, different witnesses provided additional details about the extent of defendant's involvement in the NF gang. Although these details were unknown at the time of the first prosecution, and they could not have been discovered with due diligence, they were not necessary to prosecute defendant for active gang participation at the earlier time: all the elements of a prosecution for active gang participation were provided by the testimony of William Vick and Sergeant Day. Under these circumstances, *Kellett* requires us to conclude that Abundiz cannot be charged now with participation in a gang as a free-standing offense.

However, that conclusion does not extend to the conspiracy charge. In our view, the prosecutor did not have, and could not have obtained, sufficient evidence of a conspiracy to sell drugs at the time of the previous case. The gravamen of the offense of conspiracy is the criminal agreement. To prove conspiracy, the prosecution must show that (1) the defendant intended to agree and did agree with one or more conspirators to commit a crime; (2) at the time of the agreement, the defendant and one or more of his

other alleged conspirators intended that one or more of them would commit the crime; (3) one or more of the defendants committed at least one overt act and (4) at least one overt act was committed in California. (CALCRIM 415.)

At the time of the first grand jury proceedings, the prosecution lacked the required proof of an agreement between two or more co-conspirators. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128 (*Liu*)). At that time, the prosecution had only Vick's testimony to establish that Charlie Campa was Abundiz's superior and Lorenzo Guzman was another of Vick's gang contacts. The prosecution lacked any evidence, beyond the implications of each man's membership in NF, that Abundiz actively participated in a conspiracy to sell methamphetamine with any co-conspirators. Vick himself could not act as a co-conspirator because he was only feigning his participation while acting as a police informant. (See *Liu, supra*, 46 Cal.App.4th at p. 1131.)

After the earlier case was resolved, a separate investigation by the Campbell Police Department led to evidence that could be used to prove a conspiracy took place. This investigation developed new witnesses, most importantly Debbie Guzman and Chris Klipp. Guzman observed several meetings between Abundiz and other NF members in which they discussed gang business, including the sale of methamphetamine. Additionally, both Guzman and Chris Klipp observed Abundiz making drug transactions with other gang leaders. This evidence of Abundiz's participation with co-conspirators, from witnesses who were party to the meetings and present during the transactions, provided the prosecution, for the first time, with evidence to support a charge of conspiracy to sell methamphetamine.

Moreover, the objective of the present charge of conspiracy to sell methamphetamine is distinct from the objectives of previous charges of possession and sale. Abundiz argues that he was engaged in a single course of conduct, with the objective and intent of actively participating in NF, throughout his entire course of criminal conduct. This intent is too broad and amorphous to constitute a single objective

for such wide-ranging criminal conduct. Any crime he committed during his membership in NF could be attributed to this general objective, from drug sales to assaults. Defendant's objective in the 2006 methamphetamine sale was to turn a specific quantity of methamphetamine he had on hand into a money profit. His objective in possessing methamphetamine in 2007 was to sell it at a later date. Both crimes had the secondary objective of benefitting the NF. By contrast, the objective driving the conspiracy charged in the later indictment was to give broad power and funding to the NF prison gang and to maintain defendant's status and power within the gang. The conspiracy, therefore, had a long term objective on a larger scale.

In short, the conspiracy charged in the current indictment is not barred by *Kellett* because its particulars were not known and could not have been discovered by the prosecution any earlier; the conspiracy encompasses different offenses occurring at different times and places; and the conspiracy is driven by separate and separable objectives. Under these circumstances, we conclude, *Kellett* and its progeny do not require dismissal of the conspiracy count.

CONCLUSION

Kellett requires dismissal of the charge that defendant engaged in active gang participation, but does not require dismissal of the charge of conspiracy.

DISPOSITION

The petition for writ of mandate is granted. The Superior Court of the State of California for the County of Santa Clara is directed to issue its order dismissing defendant from count 1 of the indictment in case number 211361, charging him with active participation in a criminal street gang, in violation of Penal Code section 186.22, subdivision (a).

McAdams, J.

I CONCUR:

Mihara, J.

I CONCUR IN THE JUDGMENT ONLY:

Bamattre-Manoukian, Acting P.J.